

1 Robert Van Wyck Bar No. 007800  
Chief Bar Counsel  
State Bar of Arizona  
2 4201 N. 24th Street, Suite 200  
Phoenix, Arizona 85016-6288  
3 Telephone: (602) 340-7241

4 IN THE SUPREME COURT STATE OF ARIZONA

5 PETITION TO AMEND ) SUPREME COURT  
6 RULE 111 OF THE ARIZONA ) NO. R- \_\_\_\_\_  
7 SUPREME COURT AND RULE 28 OF )  
THE ARIZONA RULES OF CIVIL )  
8 APPELLATE PROCEDURE )  
9 )  
10 )

11 The State Bar of Arizona respectfully petitions this Court, pursuant to  
12 Rule 28, Rules of the Arizona Supreme Court, to amend Rule 111 of the Arizona  
13 Supreme Court and Rule 28 of the Arizona Rules of Civil Appellate Procedure  
14 (“ARCAP”).

15 **I. Background and Summary of Proposed Changes**

16 This Petition proposes changes to Arizona’s rules concerning the availability  
17 and citation of unpublished decisions, referred to in Arizona’s rules as  
18 “memorandum” decisions. *See* ARCAP 28; Sup. Ct. R. 111. Because one of the  
19 proposed changes is more controversial than the other two, the Petition submits  
20

1 two rule proposals, one with the more controversial change and one without that  
2 proposed change.

3       **A. Recent Changes at the Federal Level and Among the States**

4       By way of background, in recent years there has been renewed discussion  
5 across the United States concerning unpublished decisions, resulting in what one  
6 commentator has described as a “nationwide reexamination of non-precedent  
7 practice.”<sup>1</sup> With technology able to solve storage and accessibility issues, many  
8 courts have adopted rules allowing unpublished decisions to be cited for their  
9 persuasive or precedential value. Most recently, the United States Supreme Court  
10 adopted a new uniform rule applicable to all federal appellate courts. *See* Fed. R.  
11 App. P. 32.1 (2007) (“**FRAP 32.1**”). Effective December 1, 2006 (and on a  
12 prospective basis), individual circuits may no longer “prohibit or restrict the  
13 citation of federal judicial opinions . . . or other written dispositions” regardless of  
14 any designation like “unpublished” or “non-precedential.” *Id.* The adoption of  
15 this uniform federal rule followed several circuits’ adoption of more permissive  
16 citation rules, which had left only four circuits, including the Ninth Circuit, as  
17 those that generally prohibited the citation of unpublished decisions.<sup>2</sup>

18  
19 <sup>1</sup> *See* Richard B. Cappalli, *The Common Law’s Case Against Non-Precedential Opinions*,  
76 S. Cal. L. Rev. 755, 758-59 (2003).

20 <sup>2</sup> *See* Stephen R. Barnett, *No-Citation Rules Under Siege: A Battle Field Report and Analysis*, 5 J. of App. Pract. at 474 (Jan. 2004) (summarizing changes made by the federal circuits and states); *see also* Melissa M. Serfass and Jessie Wallace Cranford, *Federal and State Rules Governing Publication and Citation: An Update*, 6 J. of

1 Among the states, since 2000 at least seven have modified their citation rules,  
2 including Texas, Utah, and West Virginia (which now permit unpublished  
3 decisions to be cited as precedent), and Alaska, Iowa, and Kansas (which now  
4 permit unpublished decisions to be cited for persuasive value).<sup>3</sup> Ohio also  
5 modified its rule from allowing citation for persuasive value to whatever value the  
6 court deems appropriate, while Wisconsin considered, but rejected, modifying its  
7 rule.<sup>4</sup> With these recent changes, 22 states now allow citation and 24 do not (with  
8 several others states' rules too unclear to call).<sup>5</sup> Other states, including Illinois and  
9 Hawaii, are currently considering the issue.

#### 10 **B. Arizona's Current Rule**

11 In Arizona, citation to unpublished or memorandum decisions has been  
12 generally prohibited since 1973 pursuant to Arizona Supreme Court Rules 48 and  
13 111 and ARCAP 28.<sup>6</sup> The Arizona Supreme Court and the Arizona Court of  
14 Appeals have interpreted Rule 28(c) as "mak[ing] it improper to cite unpublished  
15

---

16 Appellate Practice and Process 349 (2004) (summarizing the circuits' and states' current  
17 rules) available at <http://www.nonpublication.com/fjc.pdf>.

<sup>3</sup> See Barnett, *supra* note 2, at 478-79; see also Serfass and Cranford, *supra* note 2, at  
18 349.

<sup>4</sup> Barnett, *supra* note 2, at 480.

<sup>5</sup> Serfass and Wallace, *supra* note 2, at 349-50.

18 <sup>6</sup> See Historical Notes to Arizona Supreme Court Rule 111 found in 17A Arizona Revised  
19 Statutes at 849 (2004). By order dated November 1, 1977, the Supreme Court abrogated  
20 Supreme Court Rule 48 as it applied to civil appeals, substituting ARCAP 28. See  
Nov. 1, 1977 order found at 17B A.R.S. at 2 (2003) and comment to ARCAP 28 found at  
17B A.R.S. at 85 (2003). The Supreme Court renumbered Rule 48 as Rule 111 in 1985.  
See Historical Notes to Supreme Court Rule 111 at 17A Arizona Revised Statutes at 849  
(2004). Thus, Rule 111 presently prohibits the citation of unpublished decisions in all  
courts except in civil appeals and ARCAP 28 prohibits such citation in any civil appeal.

1 decisions as authority,” and “appl[ying] to memorandum decisions from any  
2 court.”<sup>7</sup> This interpretation makes Arizona’s current citation rule one of the  
3 strictest in the Nation. In contrast to every federal circuit court and some state  
4 courts, it is also not currently possible for attorneys or members of the public to  
5 electronically access or search memorandum decisions. Memorandum decisions  
6 are sent only to the parties; others may only review such decisions by visiting the  
7 Court of Appeals’ clerk’s office.

### 8 **C. The Proposed Changes**

9 To bring Arizona practice more in line with federal practice and for other  
10 reasons explained below, this Petition submits two proposals that suggest three  
11 significant changes to Arizona’s citation rules, including a change that concerns  
12 the electronic availability of memorandum decisions. The proposals do not  
13 recommend substantive changes to the “depublication” rule.

#### 14 **a. The Availability of Memorandum Decisions**

15 First, the State Bar recommends making unpublished memorandum  
16 decisions more accessible to the public and lawyers by making them publicly  
17

---

18 <sup>7</sup> *Walden Books Co. v. Ariz. Dept. of Rev.*, 198 Ariz. 584, 589, ¶ 22, 12 P.3d 809, 814  
19 (App. 2000). *Accord Kriz v. Buckeye Petroleum Co., Inc.*, 145 Ariz. 374, 377 n. 3, 701  
20 P.2d 1182, 1185 n. 3 (1985); *Southwest Airlines Co. v. Arizona Dept. of Revenue*, 197  
Ariz. 475, 478, ¶¶ 11-12, 4 P.3d 1018, 1021 (App. 2000); *First Interstate Bank of  
Arizona v. State Dept. of Revenue*, 185 Ariz. 433, 437, 916 P.2d 1149, 1153 (App. 1995).  
*Compare Simat Corp. v. AHCCCS*, 203 Ariz. 454, 46, ¶ 26 and nn. 4-6, 56 P.3d 28, 35  
and nn. 4-6 (2002) (while it is improper to cite to out-of-state memorandum decisions to  
an Arizona court, court took judicial notice of such cases for purpose of thoroughness).

1 available in an online, searchable database (e.g., Westlaw, Lexis, FastCase, or  
2 something comparable). The Court of Appeals currently decides approximately  
3 90% of its cases by way of memorandum decision. Published decisions provide a  
4 very narrow window into the Court of Appeals' current decisions. The State Bar  
5 believes that allowing practitioners to review the so-called "routine" cases  
6 governed by memorandum decisions – as practitioners have been able to do with  
7 Ninth Circuit and other circuits' unpublished decisions for years – will provide  
8 attorneys a better means to provide real-world advice to clients.

9 **b. Treatment of Non-Arizona Unpublished Decisions**

10 Second, the State Bar recommends adopting rules to allow parties to cite  
11 non-Arizona unpublished decisions for persuasive value, unless the issuing  
12 jurisdiction prohibits such citation. All circuit courts and approximately half of the  
13 states no longer prohibit parties from citing unpublished decisions. If an issuing  
14 court does not restrict the citation of an unpublished decision, parties should be  
15 able to cite such a decision to Arizona's courts. Under the proposed rule, copies of  
16 any such "unpublished" decisions, whether published electronically or not, must be  
17 provided to the court and other parties.

18 **c. Treatment of Arizona Memorandum Decisions**

19 Although the State Bar does not take an official position on the third  
20 proposed change, there is a consensus that the Supreme Court should receive

1 comments and consider whether to join the federal appellate courts and the other  
2 states that have lifted the general ban on citing unpublished decisions.

3       The specific change discussed here grew out of an extensive study,  
4 undertaken by the State Bar Civil Practice and Procedure Committee, of other  
5 states rules, the proposed federal rule, and the arguments for and against more  
6 permissive citation rules. In light of concerns about workload and other related  
7 issues, the proposed change would continue to impose a number of restrictions and  
8 limitations on the use of unpublished decisions. First, the proposed change makes  
9 clear that citing Arizona memorandum decisions remains disfavored (except for res  
10 judicata and other similar purposes), but that such citation is permissible if the  
11 citing party believes that the decision persuasively addresses a material issue in the  
12 case, and believes that there is no published opinion from the Supreme Court or  
13 Court of Appeals that adequately addresses the issue.

14       Second, and more important to the workload issue, although citeable,  
15 memorandum decisions would not be considered binding precedent. They could  
16 be cited for persuasive value only, and thus would be treated similarly to any other  
17 non-precedential authority, such as a decision issued by a non-Arizona court or a  
18 law review article. With this limitation, memorandum decisions would be  
19 evaluated on the basis of the strength of the reasoning contained within them, and  
20 judges writing them need not worry that an unintended ambiguity in a decision

1 would govern all future cases. The problems and limitations of relying on  
2 memorandum decisions – such as that the briefing or record in a particular case  
3 were poor – would also be well understood by the courts to whom such decisions  
4 could be cited.

5 Third, the proposed change concerning Arizona memorandum decisions  
6 would apply on a prospective basis only.

7 Lastly, the rule would require that the citing party note in its brief or other  
8 pleading that the decision is unpublished, and include a copy of the decision or  
9 order in an accompanying addendum or appendix.

#### 10 **D. The Two Proposals**

11 Recognizing the more controversial nature of the third proposed change, this  
12 petition submits two rule proposals. The first proposal (“**Proposal 1**”)  
13 incorporates all three changes. The second proposal (“**Proposal 2**”) incorporates  
14 the first two changes. Additionally, the proposals recommend amending ARCAP  
15 28 so that it references Supreme Court Rule 111, rather than reiterating the rule.

## 16 **II. Summary of Key Arguments for and Against Allowing Citation to** 17 **Unpublished Decisions**

18 Detailed arguments for and against the proposed changes, along with  
19 additional background and history concerning citation rules, were featured in the  
20 June 2006 issue of *The Arizona Attorney*. Two websites –

1 www.nonpublication.com and www.secretjustice.org – have also collected law  
2 review articles and other publications concerning the issue of citing unpublished  
3 decisions. The key arguments for and against the more permissive citation rule are  
4 summarized below.

5 **A. Key Arguments for Permitting Citation**

6 Those favoring more permissive citation rules generally offer one of the  
7 following arguments or a variant thereof.

8 First, allowing citation promotes consistent judicial decision making.

9 Foundational to the rule of law is that the law apply equally to all citizens.

10 Allowing parties to inform a court of its own prior decisions helps to  
11 institutionalize the equality of law. Indeed, given the foundational importance of  
12 the equal application of law, a court may not legitimately prohibit those who come  
13 before it from citing one of the court's own prior decisions.

14 Second, allowing courts to issue and parties to cite unpublished decisions  
15 allows appellate judges to engage in intra-court dialogue before reaching a firm  
16 resolution on a new and difficult legal issue. Allowing practitioners to cite  
17 unpublished decisions assists this process by making it easier for the Court of  
18 Appeals to intentionally face a variety of fact patterns before issuing a precedential  
19 opinion.



1 Third, virtually everything else – from Shakespeare, to the *Bible*, to the *New*  
2 *York Times* – can be cited to courts. None of these sources have any precedential  
3 value, but they can be used for persuasive purposes. If one can cite these sources,  
4 one should be able to cite unpublished decisions.

5 Fourth, unpublished decisions can be a valuable source of insight and  
6 information, and can demonstrate points that have nothing to do with the merits or  
7 legal reasoning contained in the decisions. Even the fact that courts have  
8 considered an issue may have significance. Where they are available, unpublished  
9 decisions are read by both attorneys and judges, and often cited by attorneys,  
10 district court judges, and appellate court judges, even in circuits that purport to  
11 forbid such citation. Unpublished decisions can be particularly helpful to trial  
12 court judges, who so often must exercise discretion in applying relatively settled  
13 law to an infinite variety of facts. Indeed, in connection with FRAP 32.1, only four  
14 of the 1000-plus active and senior district judges expressed concerns about the  
15 change.

16 Fifth, allowing unpublished decisions to be cited helps strengthen the  
17 judiciary by eliminating any public perception that courts “hide” decisions, or treat  
18 some people or cases differently in unpublished decisions. They also help confirm  
19 that courts decide cases in accordance with the law as most unpublished decisions  
20 involve the routine application of law to particular facts.

1        **B.     Key Arguments for Prohibiting Citation**

2        Opponents of more permissive citation rules generally offer one of the  
3 following arguments or a variant thereof.

4        First, unpublished decisions are necessary for busy courts like the Arizona  
5 Court of Appeals because they take much less time to draft than published  
6 opinions. Judges do not spend as much time drafting unpublished decisions  
7 because they know that such opinions function only as explanations to those  
8 involved in the cases. If unpublished decisions could be cited, judges would  
9 respond by issuing many more one-line judgments that provide no explanation or  
10 by putting much more time into drafting unpublished decisions (or both). Both  
11 practices would harm the justice system.

12        Second, there is little of value in unpublished decisions for purposes outside  
13 of the case at issue. These opinions merely inform the parties and the lower court  
14 of why the court of appeals concluded that the lower court did or did not err.  
15 Allowing them to be cited will simply bring more clutter, but offer nothing of  
16 substance.

17        Third, while non-legal sources may be cited for persuasive value, they have  
18 much less persuasive value than the unpublished decision of a three-judge panel on  
19 the Court of Appeals. Judges and parties are more likely to follow an unpublished  
20 decision of a panel on the Court of Appeals, than a recommendation by the *New*

1 *York Times* or a quote from Shakespeare. Given the nature of how the Court of  
2 Appeals deals with unpublished decisions as opposed to opinions, judges and  
3 parties might be misled in relying on those unpublished decisions.

4 Fourth, abolishing no-citation rules will increase the costs of legal  
5 representation in at least two ways. First, it will increase the size of the body of  
6 case law that will have to be researched by attorneys. Since only approximately  
7 10% of all decisions are now published in Arizona, this will mean that judges and  
8 attorneys would now have to find and analyze nine times as many cases overall if  
9 they were to adequately represent their clients. Second, it will make the body of  
10 case law more difficult to understand.

11 Fifth, it is unclear whether the alleged lack of effect of such rule changes on  
12 the work of other appellate courts would be transferable to Arizona. While the  
13 federal study noted below seems to show that the fear of the deleterious effects of  
14 the proposed change on workings of appellate courts and on the bar have not been  
15 realized in practice, the study does not take into account that many jurisdictions  
16 had already been issuing summary decisions. Such decisions do not detail their  
17 legal reasoning. Allowing citation of those decisions would not affect the time it  
18 took to prepare the decision or increase the expense of research by lawyers having  
19 to read them.

1 Finally, any perception that the Court of Appeals is hiding its decisions is  
2 not based in fact.

### 3 C. Lessons from the Federal Rule Change

4 Many of the arguments both for and against allowing the citation of  
5 unpublished decisions were vetted at the federal level in connection with  
6 consideration of FRAP 32.1 Indeed, when the United States Judicial Conference  
7 Advisory Committee on Appellate Rules voted in favor of adopting FRAP 32.1,  
8 more than 500 comments poured in, many of them raising fears, concerns, and  
9 predictions about the judicial workload and other “adverse consequences that  
10 assertedly *will follow* if Rule 32.1 [were] adopted.”<sup>8</sup> Among the comments,  
11 however, there was curiously little or no criticism from judges who had actual  
12 experience with courts that allowed the citation of their unpublished decisions.<sup>9</sup>

13 To help evaluate the workload and other concerns raised by critics, the  
14 Federal Judicial Center (“FJC”), a statutorily authorized research and education  
15 agency of the federal judicial system, conducted empirical research to understand  
16 the impact of allowing such citation in all federal circuit courts.<sup>10</sup> The FJC

---

18 <sup>8</sup> Statement of Stephen R. Barnett, *Hearing on Proposed Amendments to the Federal*  
19 *Rules of Appellate Procedure Before the Appellate Rules Committee, United States*  
20 *Judicial Conference* 2-3 (April 13, 2004) available at  
[www.nonpublication.com/barnett32.1.pdf](http://www.nonpublication.com/barnett32.1.pdf).

<sup>9</sup> See *id.*

<sup>10</sup> See Federal Judicial Center, *Citations to Unpublished Opinions in the Federal Courts*  
of Appeals: Preliminary Report 1 (April 14, 2005) available at  
[www.fjc.gov/public/pdf.nsf/lookup/Citatio1.pdf/\\$File/Citatio1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Citatio1.pdf/$File/Citatio1.pdf).

1 surveyed all 257 sitting circuit judges and a random sample of attorneys who  
2 practice before those courts. Those who believed that allowing citation would  
3 adversely affect the functioning of the judiciary generally sat in circuits that  
4 prohibited citation. In circuits where such citation occurred, the judges generally  
5 agreed that changing the federal rule would have “no impact on the number of  
6 unpublished decisions, the length of unpublished decisions, or the time it takes to  
7 draft them.”<sup>11</sup> Judges from two circuits that had recently changed their rules to  
8 allow citation – the First Circuit and D.C. Circuit – also did not report experiencing  
9 the problems critics predicted.<sup>12</sup> Lastly, the majority of lawyers surveyed “said  
10 that a rule permitting citation to unpublished decisions would not impose a burden  
11 on their work, and most expressed support for such a rule.”<sup>13</sup> The proposal to  
12 adopt FRAP 32.1 passed after completion of the study.

13 Several judges from the Ninth Circuit voiced vigorous opposition to FRAP  
14 32.1 (which now gives unpublished decisions *precedential* effect), and they made  
15 many of the same arguments summarized above.<sup>14</sup> By the time the Court considers  
16 this petition, FRAP 32.1 will have been in effect for over a year. This Court will,

---

17 <sup>11</sup> *Id.* at 3.

18 <sup>12</sup> *Id.* at 11-13.

19 <sup>13</sup> *Id.* at 15.


20 <sup>14</sup> See, e.g., Statement of Honorable Alex Kozinski, Judge, United States Court of Appeals for the Ninth Circuit available at [http://commdocs.house.gov/committees/judiciary/hju80454.000/hju80454\\_0f.htm](http://commdocs.house.gov/committees/judiciary/hju80454.000/hju80454_0f.htm); see also *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (criticizing *Anastasoff*); Alex Kozinski and Stephen Reinhardt, *Please Don't Cite This!* “Why We Don’t Allow Citation to Unpublished Dispositions,” Cal. Law. (June 2000), <http://www.nonpublication.com/don't%20cite%20this.htm> (last visited December 20, 2006).

1 therefore, have the opportunity to see whether the “adverse consequences that  
2 assertedly *will follow*” from FRAP 32.1 actually come to fruition. If the federal  
3 rule does not result in adverse consequences in the Ninth Circuit – as the FJC study  
4 suggested – that would provide strong evidence that adopting Proposal 1 would not  
5 adversely impact Arizona.

### 6 **III. CONCLUSION**

7 Arizona’s appellate courts should join the other jurisdictions that have made  
8 their unpublished decisions available electronically, parties should be permitted to  
9 cite non-Arizona unpublished decisions in more circumstances, and the Court  
10 should consider permitting parties to cite Arizona unpublished decisions for  
11 persuasive purposes.

12 DATED this 11 day of Dec, 2007.

13  
14 

15 Robert Van Wyck  
16 Chief Bar Counsel  
State Bar of Arizona

17 Electronic copy filed with the  
18 Clerk of the Supreme Court of Arizona  
this 11<sup>th</sup> day of December, 2007.

19 by: Kathleen Lundgren  
20

**PROPOSAL 1: DRAFT RULE TO PERMIT CITATION OF  
ARIZONA AND NON-ARIZONA UNPUBLISHED DECISIONS**

**Rule 111.** Publication of Opinions of the Supreme Court and Court of Appeals; Citation Rules; Depublication

**(a) Types of dispositions.**

1. An opinion is a written disposition of a matter by the Supreme Court or Court of Appeals that is distributed for reporting by publishing companies in compliance with the provisions of A.R.S. §§ 12-107, 12-108, and 12-120.07 and intended to be precedential.
2. A memorandum decision is a written disposition of a matter by the Supreme Court or Court of Appeals that is not intended to be reported by publishing companies, and is not intended to be precedential. The court issuing the memorandum decision shall arrange for it to be readily publicly available in electronic form.
3. An order is any disposition of a matter before the court other than by opinion or memorandum decision.

**(b) When disposition shall be by opinion.** Dispositions of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine that it:

1. Establishes, alters, modifies or clarifies a rule of law, or
2. Calls attention to a rule of law which appears to have been generally overlooked, or
3. Criticizes existing law, or
4. Involves a legal or factual issue of unique interest or substantial public importance, or

if the disposition of matter is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the decision shall be by opinion.

**(c) Designation of written disposition.** The written disposition of the case shall contain in the caption thereof the designation "Opinion", "Memorandum Decision", or "Order."

**(d) Mixed designation.** When the court issuing a decision concludes that only a portion of that decision meets the criteria of subsection (b) above for an opinion, the court shall issue that portion of the decision as a published opinion and shall issue the remainder of the decision as a separate memorandum decision.

**(e) Citation of memorandum decisions and orders.** Memorandum decisions and orders may be cited only in the following circumstances in accordance with the following procedure:

1. A memorandum decision or order may be cited to establish a fact about the case before the

**PROPOSAL 1: DRAFT RULE TO PERMIT CITATION OF  
ARIZONA AND NON-ARIZONA UNPUBLISHED DECISIONS**

court (for example, its procedural history) or when the binding or preclusive effect of the opinion, rather than its quality as precedent, is relevant to support a claim of res judicata, collateral estoppel, law of the case, double jeopardy, or other similar doctrine.

2. Citation of a memorandum decision or order is otherwise disfavored, but may be cited if: (1) the party believes that the decision persuasively addresses a material issue in the case; and (2) there is no published opinion from the Supreme Court or Court of Appeals that adequately addresses the issue. Such decisions or orders may be considered by the court for their persuasive value only, and not as binding precedent.

3. A party must note in its brief or other pleading that the decision is unpublished, and a copy of the decision or order must be included in an accompanying addendum or appendix.

**(f) Decisions from other courts.** Memorandum, unpublished or non-precedential decisions or orders of other courts, as defined or understood by those courts, may be cited in the circumstances set forth in subsection (e)(1) above. Such decisions or orders may also be cited in circumstances analogous to those set forth in subsection (e)(2) above unless prohibited by the rules of the issuing court. When such a decision or order is cited, the party must comply with the procedure set forth in subsection (e)(3) above.

**(g) Publication of dissenting vote on denial of petition for review.** If a Petition for Review is denied and a justice of the Supreme Court voted to grant review, such justice's dissenting vote shall be reported in the caption of the decision of the Court of Appeals.

**(h) Depublication.** In a case that is before the Supreme Court on a petition for review, cross-petition for review, or petition for special action, the Supreme Court may, before the opinion, memorandum decision, or order becomes final, enter an order indicating that the opinion, memorandum decision, or order not be published or cited. Such an opinion, memorandum decision, or order may not be cited other than pursuant to subsection (e)(1) above.

**(i) Effective date.** This rule shall be effective as of 1 December 2009, and shall apply to all opinions and memorandum decisions issued by the Supreme Court and Court of Appeals after the effective date. Upon its effective date, this rule shall apply to decisions from other courts, regardless of when the decisions were issued.

Comment: Subsection (a)(2) adopts a new rule that requires memorandum decisions to be readily publicly available in electronic format, for example via the internet.

Subsections (a) and (e) clarify that the restriction on the citation of memorandum decisions applies only to decisions rendered by Arizona state courts, contrary to the prior rule as interpreted in several cases. *See, e.g., Kriz v. Buckeye Petroleum Co.*, 145 Ariz. 374, 377 n. 3, 701 P.2d 1182, 1185 n. 3 (1985) (memorandum decisions by the United States District Courts are governed by Rule 28(c), *Ariz. R. Civ. App. Pro.*) and *Walden Books Co. v. Department of Revenue*, 198 Ariz. 584, 589, 12 P.3d 809, 814 (Ct. App. 2000) (“We hold that ARCAP 28(c) applies to memorandum decisions [sic] from any court.”)



**PROPOSAL 1: DRAFT RULE TO PERMIT CITATION OF  
ARIZONA AND NON-ARIZONA UNPUBLISHED DECISIONS**

Section (f) clarifies when decisions issued by other jurisdictions may be cited.

**PROPOSAL 1: DRAFT RULE TO PERMIT CITATION OF  
ARIZONA AND NON-ARIZONA UNPUBLISHED DECISIONS**

**Rule 111. Publication of Opinions of the Supreme Court and Court of Appeals; Citation Rules; Depublication**

**(a) Definitions.**

**(a) Types of dispositions.**

1. An opinion is a written disposition of a matter ~~which is intended for publication under (4) below by the Supreme Court or Court of Appeals that is distributed for reporting by publishing companies in compliance with the provisions of A.R.S. §§ 12-107, 12-108, and 12-120.07 and intended to be precedential.~~

2. A memorandum decision is a written disposition of a matter ~~not intended for publication by the Supreme Court or Court of Appeals that is not intended to be reported by publishing companies, and is not intended to be precedential. The court issuing the memorandum decision shall arrange for it to be readily publicly available in electronic form.~~

3. An order is any disposition of a matter before the court other than by opinion or memorandum decision.

4. ~~Publication is the distribution of opinions for reporting by publishing companies in compliance with the provisions of A.R.S. §§ 12-107, 12-108, and 12-120.07.~~

**(b) When disposition shall be by opinion.** Dispositions of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine that it:

1. Establishes, alters, modifies or clarifies a rule of law, or
2. Calls attention to a rule of law which appears to have been generally overlooked, or
3. Criticizes existing law, or
4. Involves a legal or factual issue of unique interest or substantial public importance, or

if the disposition of matter is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the decision shall be by opinion.

**(c) Dispositions as Precedent.** ~~Memorandum decisions shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review. Any party citing a memorandum decision pursuant to this rule must attach a copy of it to the motion or petition in which such decision is cited.~~ **(d) Designation of written disposition.** ~~The written disposition.~~ The written disposition of

**PROPOSAL 1: DRAFT RULE TO PERMIT CITATION OF  
ARIZONA AND NON-ARIZONA UNPUBLISHED DECISIONS**

the case shall contain in the caption thereof the designation "Opinion", "Memorandum Decision", or "Order", or "Order."

**(d) Mixed designation.** When the court issuing a decision concludes that only a portion of that decision meets the criteria of subsection (b) above for an opinion, the court shall issue that portion of the decision as a published opinion and shall issue the remainder of the decision as a separate memorandum decision.

**(e) Citation of memorandum decisions and orders.** Memorandum decisions and orders may be cited only in the following circumstances in accordance with the following procedure:

1. A memorandum decision or order may be cited to establish a fact about the case before the court (for example, its procedural history) or when the binding or preclusive effect of the opinion, rather than its quality as precedent, is relevant to support a claim of res judicata, collateral estoppel, law of the case, double jeopardy, or other similar doctrine.

**(e)** This rule shall be effective as of 1 September 1973.

2. Citation of a memorandum decision or order is otherwise disfavored, but may be cited if:  
(1) the party believes that the decision persuasively addresses a material issue in the case; and  
(2) there is no published opinion from the Supreme Court or Court of Appeals that adequately addresses the issue. Such decisions or orders may be considered by the court for their persuasive value only, and not as binding precedent.

3. A party must note in its brief or other pleading that the decision is unpublished, and a copy of the decision or order must be included in an accompanying addendum or appendix.

**(f) Decisions from other courts.** Memorandum, unpublished or non-precedential decisions or orders of other courts, as defined or understood by those courts, may be cited in the circumstances set forth in subsection (e)(1) above. Such decisions or orders may also be cited in circumstances analogous to those set forth in subsection (e)(2) above unless prohibited by the rules of the issuing court. When such a decision or order is cited, the party must comply with the procedure set forth in subsection (e)(3) above.

**(g) Publication of dissenting vote on denial of petition for review.** If a Petition for Review is denied and a justice of the Supreme Court voted to grant review, such justice's dissenting vote shall be reported in the caption of the decision of the Court of Appeals, if such decision is published in accordance with these rules.

**(g) Depublication.** Notwithstanding the provisions of Rule 111(b) above, an opinion which has been certified for publication by the Appeals Court shall not be published, on an order to that effect by the Supreme Court entered in a case which ~~h) Depublication.~~ In a case that is before the Supreme Court on a petition for review, cross-petition for review, or petition for special action and which is entered, the Supreme Court may, before such the opinion, memorandum decision, or order becomes final, enter an order indicating

**PROPOSAL 1: DRAFT RULE TO PERMIT CITATION OF  
ARIZONA AND NON-ARIZONA UNPUBLISHED DECISIONS**

that the opinion, memorandum decision, or order not be published or cited. Such an opinion, memorandum decision, or order may not be cited other than pursuant to subsection (e)(1) above.

(i) Effective date. This rule shall be effective as of 1 December 2009, and shall apply to all opinions and memorandum decisions issued by the Supreme Court and Court of Appeals after the effective date. Upon its effective date, this rule shall apply to decisions from other courts, regardless of when the decisions were issued.

Comment: Subsection (a)(2) adopts a new rule that requires memorandum decisions to be readily publicly available in electronic format, for example via the internet.

Subsections (a) and (e) clarify that the restriction on the citation of memorandum decisions applies only to decisions rendered by Arizona state courts, contrary to the prior rule as interpreted in several cases. See, e.g., *Kriz v. Buckeye Petroleum Co.*, 145 Ariz. 374, 377 n. 3, 701 P.2d 1182, 1185 n. 3 (1985) (memorandum decisions by the United States District Courts are governed by Rule 28(c), *Ariz. R. Civ. App. Pro.*) and *Walden Books Co. v. Department of Revenue*, 198 Ariz. 584, 589, 12 P.3d 809, 814 (Ct. App. 2000) (“We hold that ARCAP 28(c) applies to memorandum decisions [sic] from any court.”)

Section (f) clarifies when decisions issued by other jurisdictions may be cited.

(h) ~~Memorandum Decision.~~ [FN1] ~~When the Court issuing a decision concludes that only a portion of that decision meets the criteria for publication as an opinion, the Court shall issue that portion of the decision as a published opinion and shall issue the remainder of the decision as a separate memorandum decision not intended for publication.~~

**PROPOSAL 2: DRAFT RULE TO PERMIT CITATION OF  
NON-ARIZONA UNPUBLISHED DECISIONS**

**Rule 111. Publication of Opinions of the Supreme Court and Court of Appeals; Citation Rules; Depublication**

**(a) Definitions.**

1. An opinion is a written disposition of a matter that is intended for publication under (4) below.
2. A memorandum decision is a written disposition of a matter not intended for publication. The court issuing the memorandum decision shall arrange for it to be readily publicly available in electronic form.
3. An order is any disposition of a matter before the court other than by opinion or memorandum decision.
4. Publication is the distribution of opinions for reporting by publishing companies in compliance with the provisions of A.R.S. §§ 12-107, 12-108, and 12-120.07.

**(b) When disposition to be by opinion.** Dispositions of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine that it:

1. Establishes, alters, modifies or clarifies a rule of law, or
2. Calls attention to a rule of law which appears to have been generally overlooked, or
3. Criticizes existing law, or
4. Involves a legal or factual issue of unique interest or substantial public importance, or

if the disposition of matter is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the decision shall be by opinion.

**(c) Dispositions as Precedent.** Memorandum decisions issued by the Supreme Court or Court of Appeals shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review. Memorandum or unpublished decisions issued by other jurisdictions may be cited to any Arizona court for persuasive purposes unless citation for such purposes is prohibited by the rules of the issuing court. Any party citing a memorandum decision pursuant to this rule must attach a copy of it to the motion or petition in which such decision is cited.

**(d) Designation of written disposition.** The written disposition of the case shall contain in the caption thereof the designation "Opinion", "Memorandum Decision", or "Order."

**PROPOSAL 2: DRAFT RULE TO PERMIT CITATION OF  
NON-ARIZONA UNPUBLISHED DECISIONS**

**(e) Effective date.** This rule shall be effective as of 1 December 2008.

**(f) Publication of dissenting vote on denial of petition for review.** If a Petition for Review is denied and a justice of the Supreme Court voted to grant review, such justice's dissenting vote shall be reported in the caption of the decision of the Court of Appeals, if such decision is published in accordance with these rules.

**(g) Depublication.** Notwithstanding the provisions of Rule 111(b) above, an opinion which has been certified for publication by the Appeals Court shall not be published, on an order to that effect by the Supreme Court entered in a case which is before the Supreme Court on a petition for review, cross-petition for review, or petition for special action and which is entered before such opinion becomes final.

**(h) Mixed designation.** When the Court issuing a decision concludes that only a portion of that decision meets the criteria for publication as an opinion, the Court shall issue that portion of the decision as a published opinion and shall issue the remainder of the decision as a separate memorandum decision not intended for publication.

Comment: Section (c) is amended to allow the citation of decisions issued by other jurisdictions if the decision could be cited under the issuing court's rules, and to clarify that the restriction on the citation of memorandum decisions applies only to decisions rendered by the Arizona Supreme Court and Arizona Court of Appeals, contrary to the manner in which the prior rule was interpreted. *See, e.g., Kriz v. Buckeye Petroleum Co.*, 145 Ariz. 374, 377 n. 3, 701 P.2d 1182, 1185 n. 3 (1985) (memorandum decisions by the United States District Courts are governed by Rule 28(c), *Ariz. R. Civ. App. Pro.*) and *Walden Books Co. v. Department of Revenue*, 198 Ariz. 584, 589, 12 P.3d 809, 814 (Ct. App. 2000) ("We hold that ARCAP 28(c) applies to memorandum decisions [sic] from any court.").

**PROPOSAL 2: DRAFT RULE TO PERMIT CITATION OF  
NON-ARIZONA UNPUBLISHED DECISIONS**

**Rule 111.** Publication of Opinions of the Supreme Court and Court of Appeals; Citation Rules; Depublication

**(a) Definitions.**

1. An opinion is a written disposition of a matter ~~which~~that is intended for publication under (4) below.
2. A memorandum decision is a written disposition of a matter not intended for publication. The court issuing the memorandum decision shall arrange for it to be readily publicly available in electronic form.
3. An order is any disposition of a matter before the court other than by opinion or memorandum decision.
4. Publication is the distribution of opinions for reporting by publishing companies in compliance with the provisions of A.R.S. § § 12-107, 12-108, and 12-120.07.

**(b) When disposition to be by opinion.** Dispositions of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine that it:

1. Establishes, alters, modifies or clarifies a rule of law, or
2. Calls attention to a rule of law which appears to have been generally overlooked, or
3. Criticizes existing law, or
4. Involves a legal or factual issue of unique interest or substantial public importance, or

if the disposition of matter is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the decision shall be by opinion.

**(c) Dispositions as Precedent.** Memorandum decisions issued by the Supreme Court or Court of Appeals shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review. Memorandum or unpublished decisions issued by other jurisdictions may be cited to any Arizona court for persuasive purposes unless citation for such purposes is prohibited by the rules of the issuing court. Any party citing a memorandum decision pursuant to this rule must attach a copy of it to the motion or petition in which such decision is cited.

**PROPOSAL 2: DRAFT RULE TO PERMIT CITATION OF  
NON-ARIZONA UNPUBLISHED DECISIONS**

**(d) Designation of written disposition.** The written disposition of the case shall contain in the caption thereof the designation "Opinion", "Memorandum Decision", or "Order."

**(e) Effective date.** This rule shall be effective as of ~~1 September 1973~~ December 2008.

**(f) Publication of dissenting vote on denial of petition for review.** If a Petition for Review is denied and a justice of the Supreme Court voted to grant review, such justice's dissenting vote shall be reported in the caption of the decision of the Court of Appeals, if such decision is published in accordance with these rules.

**(g) Depublication.** Notwithstanding the provisions of Rule 111(b) above, an opinion which has been certified for publication by the Appeals Court shall not be published, on an order to that effect by the Supreme Court entered in a case which is before the Supreme Court on a petition for review, cross-petition for review, or petition for special action and which is entered before such opinion becomes final.

**(h) ~~Memorandum Decision. [FN]~~ Mixed designation.** When the Court issuing a decision concludes that only a portion of that decision meets the criteria for publication as an opinion, the Court shall issue that portion of the decision as a published opinion and shall issue the remainder of the decision as a separate memorandum decision not intended for publication.

Comment: Section (c) is amended to allow the citation of decisions issued by other jurisdictions if the decision could be cited under the issuing court's rules, and to clarify that the restriction on the citation of memorandum decisions applies only to decisions rendered by the Arizona Supreme Court and Arizona Court of Appeals, contrary to the manner in which the prior rule was interpreted. See, e.g., *Kriz v. Buckeye Petroleum Co.*, 145 Ariz. 374, 377 n. 3, 701 P.2d 1182, 1185 n. 3 (1985) (memorandum decisions by the United States District Courts are governed by Rule 28(c), *Ariz. R. Civ. App. Pro.*) and *Walden Books Co. v. Department of Revenue*, 198 Ariz. 584, 589, 12 P.3d 809, 814 (Ct. App. 2000) ("We hold that ARCAP 28(c) applies to memorandum decisions [sic] from any court.").